

**CIVIL CASE APPELLATE STANDARDS OF REVIEW
(and a very few unavoidable related propositions of law)**

Updated and Revised (current through August 3, 2007)

by Alan G. Gless, District Court Judge, Fifth Judicial District of Nebraska.

Originally: John F. Irwin, Judge, Nebraska Court of Appeals, *Standards of Review and Propositions of Law, Civil, Part III*, in NEBRASKA INTERMEDIATE COURT OF APPEALS, APPELLATE PRACTICE (1992).

Introduction

Why would a district court judge write about or revise an appellate court judge's work on appellate standards of review and related propositions of law in civil cases? Well, two reasons – a change in legal mind set and fifteen years' worth of changes in appellate practice. First, and foremost, when Judge Irwin collected in a single work his 1992 *Standards of Review and Propositions of Law, Civil*, he was the first in recent Nebraska legal history to do so. Those of us who have used his work owe him our thanks; his contribution was invaluable to both the bench and bar of that time.

At that time, the Nebraska Court of Appeals had just commenced operation. Up until that year, the district courts, in reality, had been Nebraska's only intermediate courts of appeals from the county courts, but weren't yet conceptualized as intermediate courts of appeals when hearing appeals from county courts. That district courts weren't yet seen as sitting as intermediate appellate courts when hearing appeals from county courts was a historical carry over from earlier times.

In 1972, the legislature reorganized the county courts and increased their jurisdiction, making them a major trial court, abolished all the various local courts (such as the justice of the peace courts, police courts, etc.) and relocated their jurisdiction in the county courts, and, transferred exclusive juvenile jurisdiction from the district courts to the county courts (outside of Douglas, Lancaster, and Sarpy Counties). Until 1972, appeals from county courts and the other local courts were tried *de novo* in the district courts (unless someone committed the tactical error of taking the judgments of the county courts and local courts to the district courts by petition in error). LB 1032 (1972) changed that scenario, but the mind set that district court was just a trial court that retried county court cases when appealed hung on for some time after 1972.

The Nebraska Supreme Court and the Nebraska Court of Appeals both have worked diligently to change that pre-1972 mind set. The supreme court and court of appeals continuously have taught that, when hearing appeals from county courts, the district courts act in the capacity of intermediate appellate courts. The Nebraska Supreme Court and the Nebraska Court of Appeals both have emphasized that, when acting as intermediate appellate courts, the district courts must apply the proper appellate standards of review.

District courts conducting first level Administrative Procedure Act judicial reviews of agency actions behave more closely to their traditional trial court roles, but still must apply appellate standards of review. On appeal from the district courts' APA judicial reviews, different appellate standards of review may apply. In hearing error proceedings, another form of appellate review district courts perform at the first review level, the district courts must apply a different set of appellate standards of review than they apply in APA cases. Thus, district court judges must be aware of and appreciate the operation of the applicable appellate standards of review at the district court level. Counsel and appellate litigants must be aware of and appreciate the operation of the applicable appellate standards of review at all appellate levels.

The second, and likely more obvious, reason one would update and revise Judge Irwin's 1992 work lies in the evolution in Nebraska's civil appeals practice in the fifteen-plus years since he wrote; nearly a revolution in some areas. We're pushing up against the end of Thomas Jefferson's idea of a generation (roughly a period of nineteen years) since Judge Irwin wrote. Major changes have occurred in some areas of civil appellate practice. Major very recent changes have occurred in civil trial practice which inevitably require more changes in civil appellate practice.

What use should readers make of both editions of this collection? Judge Irwin did not offer analysis in the printed version of his edition nor do I in mine. This document should be used as a finding, or access, tool to locate the information collected herein, information which is difficult to locate in the digests and online research tools. Judge Irwin used an alphabetical arrangement; I have retained that organizational approach. This tool cannot be considered a complete collection of all of the civil appellate standards of review, no short collection could, but it does include many of the most frequently encountered standards.

Readers seeking analysis may want to consult: DAVID A. DOMINA, *THE ROLE OF THE TRIAL JUDGE IN NEBRASKA APPELLATE JURISDICTION* (2006); & Daniel L. Real, *Appellate Practice in Nebraska: A Thorough, Though Not Exhaustive, Primer in How to Do it and How to Be More Effective*, 39 CREIGHTON L. REV. 29 (2005)(and articles cited therein); and, STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* (3d ed. 1999).

ADMINISTRATIVE AGENCIES:

Neb. Dept. Health & Human Serv. *Pohlmann v. NDHHS*, 271 Neb. 272, 710 N.W.2d 639 (2006). A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *McCray v. Nebraska State Patrol*, 271 Neb. 1, 710 N.W.2d 300(2006)(**NSP**); *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005)(**Neb. Dept. Revenue**).

When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision

conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. *Id.*

Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *McCray v. Nebraska State Patrol, supra; Stejskal v. Department of Admin. Servs.*, 266 Neb. 346, 665 N.W.2d 576 (2003)(**NDAS**).

Nebraska Appeal Tribunal: In an appeal from the appeal tribunal to the district court regarding unemployment benefits, the district court conducts the review de novo on the record, but on review by the Court of Appeals or the Supreme Court, the judgment of the district court may be reversed, vacated, or modified for errors appearing on the record. *Douglas County Sch. Dist. 001 v. Dutcher*, 254 Neb. 317, 576 N.W.2d 469(1998).

A presumption of validity attaches to the actions of administrative agencies. While the presumption is rebuttable, the burden of proof rests with the party challenging the agency's action. *Haven Home, Inc. v. Dept. of Pub. Welfare*, 216 Neb. 731, 346 N.W.2d 225 (1984)(now **NDHHS**); , 230 Neb. 747, 433 N.W.2d 502 (1988)(**Public Service Commission**).

An appeal to the district court of a decision by the **State Personnel Board** is reviewed on the record of the agency if the petition was **filed in district court before July 1, 1989**. An appeal to the Supreme Court under the Administrative Procedure Act, if filed in the district court before July 1, 1989, shall be heard de novo on the record. *Nebraska Dept. of Correctional Services v. Hansen*, 238 Neb. 233, 470 N.W.2d 170 (1991).

Commission of Industrial Relations. Any order or decision of the CIR may be modified, reversed, or set aside by the appellate court on one or more of the following grounds and no other: (1) if the CIR acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the CIR do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole. In an appeal from a CIR order regarding prohibited practices stated in § 48-824, an appellate court will affirm a factual finding of the CIR, if, considering the whole record, a trier of fact could reasonably conclude that the finding is supported by a preponderance of the competent evidence. *Omaha Police Union Local 101, Iupa v. City of Omaha*, 274 Neb. 70, ___ N.W.2d ___, 2007 Neb. LEXIS 120 (August 3, 2007).

Any order or decision of the CIR may be modified, reversed, or set aside by an appellate court only on one or more of the following grounds: (1) if the CIR acts without or in excess of its powers, (2) if the order of the CIR was procured by

fraud or is contrary to law, (3) if the facts found by the CIR do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole. In an appeal from a CIR order regarding practices prohibited in § 48-824, the CIR's factual findings will be affirmed if, considering the whole record, a trier of fact could reasonably conclude that the finding is supported by a preponderance of the competent evidence. This court will consider the fact that the CIR, sitting as the trier of fact, saw and heard the witnesses and observed their demeanor while testifying and will give weight to the CIR's judgment as to credibility. *Davis v. FOP Lodge No. 8*, 15 Neb. Ct. App. 470, 731 N.W.2d 901 (2007).

AND, re APA judicial reviews geberally: when the petition instituting proceedings for APA judicial review is **filed in the district court on or after July 1, 1989**, the review shall be conducted by the district court without a jury de novo on the record of the agency. Neb. Rev. Stat, § 84-917(5)(a).

AND FURTHER, when the petition instituting proceedings for review is **filed in the district court on or after July 1, 1989, then, in the court of appeals and supreme court**, the judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record. Neb. Rev. Stat, § 84-918(3).

When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Douglas County Sch. Dist. 001 v. Dutcher*, 254 Neb. 317, 576 N.W.2d 469 (1998).

BUT, in reviewing the decision of an administrative tribunal on a **petition in error**, both the district court and the appellate court review the decision of the tribunal to determine whether it acted within its jurisdiction and whether the decision of the tribunal is supported by sufficient relevant evidence. *Maxon v. City of Grand Island*, 273 Neb. 647, 731 N.W.2d 882 (2007).

See also ZONING.

Department of Natural Resources. In an appeal from DNR, an appellate court's review of the director's factual determinations is limited to deciding whether such determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable; however, on questions of law, which include the meaning of statutes, a reviewing court is obligated to reach its conclusions independent of the legal determinations made by the director. *In re Applications T-851 and T-852. Nebraska Public Power District v. Department of Natural Resources*, 268 Neb. 620; 686 N.W.2d 360 (2004); & *In re Water Appropriation A-4924*, 267 Neb. 430, 674 N.W.2d 788 (2004).

When a judgment is attacked in a manner other than by proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a **collateral attack**. *In re Applications T-851 and T-852. Nebraska Public Power District v. Department of Natural Resources*, 268 Neb. 620; 686 N.W.2d 360 (2004).

Administrative agency decisions determining water rights pursuant to statutory authority involve the exercise of quasi-judicial powers, and when no appeal is taken from such a decision, it becomes a final and binding adjudication. *Id.*

Judgments rendered by administrative agencies acting in a quasi-judicial capacity are not subject to collateral attack if the agency had jurisdiction over the parties and the subject matter. *Id.*

Error without prejudice provides no ground for appellate relief. *Id.*

On appeal from a decision of the Department of Water Resources (**now Department of Natural Resources**), this court is to “search only for errors appearing in the record.” *In re Applications T-61 and T-62*, 232 Neb. 316, 323, 440 N.W.2d 466, 471 (1989).

Under this standard of review, our inquiry is limited to determining whether the decision conforms to the law, is supported by competent and relevant evidence, and is neither arbitrary, capricious, nor unreasonable. *In re Appropriations D-877 and A-768*, 240 Neb. 337, 482 N.W.2d 11(1992).

In reviewing the orders of administrative agencies, it is the practice of this court to consider constitutional questions when raised on direct appeal. *In re Appropriations D-887 and A-768*, 240 Neb. 337, 482 N.W.2d 11(1992). (Citing *Metropolitan Utilities Dist. v. Merritt Beach Co.*, 179 Neb. 783, 140 N.W.2d 626 (1966).

ADVISORY OPINIONS:

This court does not render advisory opinions, but simply decides cases and controversies. *Gas ‘N Shop, Inc. v. State of Nebraska*, 234 Neb. 309, 451 N.W.2d 81 (1990).

AMENDMENT OF PLEADINGS:

The right to amend pleadings rests within the sound discretion of trial court and allowing amendment will not be error unless prejudice resulted through amendment changing issues and affecting quantum of proof as to any material

fact. *Thomas v. Marvin E. Jewell & Co.*, 232 Neb. 261, 440 N.W.2d 437 (1989).

But, *query*, this old rule may or may not have survived the adoption of the Neb. R. Pldg. in Civ. Actions and the repeal of Neb. Rev. Stat. § 25-852, upon which that rule was based. No published appellate cases yet, and, although the theory of the new rules includes the liberalization of such rules, they may not liberalize amendment of pleadings.

For example, [a]lthough Neb. Ct. R. of Pldg. in Civ. Actions 15 provides authority for the trial court to allow amendment after a responsive pleading has been filed, rule 15(a) specifies that such may be done “only by leave of court or by written consent of the adverse party”; there is no specific rule in the new rules of pleading comparable to Neb. Rev. Stat. § 25-854, providing a right to amend if the court sustains a challenge to the sufficiency of the complaint to state a claim upon which relief can be granted. *Dennes v. Dunning*, 14 Neb. Ct. App. 934, 719 N.W.2d 737 (2006).

AND SEE, R. 15(b) *Amendments to Conform to the Evidence*. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party’s action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

ANSWER:

All material allegations of new matter contained in an answer are admitted if no reply is made to them. *Landon v. Pettijohn*, 231 Neb. 837, 438 N.W.2d 757 (1989).

However, that rule was based on Neb. Rev. Stat. § 25-842, and:

For purposes of this action, Neb. Rev. Stat. § 25-842 (Reissue 1995) (repealed operative January 1, 2003) provided in part that “every material allegation of new matter in the answer not controverted by the reply, shall, for the purposes of the action, be taken as true.” We have said that the failure to file a reply controverting a new allegation raised in an answer to a petition results in the

allegation's being taken as true. *Nelson v. City of Omaha*, 256 Neb. 303, 589 N.W.2d 522 (1999); *Landon v. Pettijohn*, 231 Neb. 837, 438 N.W.2d 757 (1989).

Applicable to all civil actions filed on or after January 1, 2003:

Rule 7. Pleadings Allowed; Form of Motions:

(a) *Pleadings*. There shall be a complaint and an answer; a reply to a counterclaim denominated as such, if the answer contains a counterclaim; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned as a third-party defendant; and a third-party answer, if a third party complaint is served. *No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.* (Italics added).

Comment. -- The initial pleading will be a petition when that designation is provided by statute. See § 25-801.01(2)(b). . . .

Rule 8. General Rules of Pleading:

...

(d) *Effect of Failure to Deny*. Averments in a pleading to which a responsive pleading is required, other than those as to value or the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

APPEALABLE FINAL ORDERS:

Final order, defined. An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed, as provided in this chapter. Neb. Rev. Stat. § 25-1902.

Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. An order is final for the purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or

(3) is made on summary application in an action after judgment is rendered. *Pfeil v. State*, 273 Neb. 12, 727 N.W.2d 214 (2007).

For the purposes of § 25-1902, a special proceeding includes every special statutory remedy which is not in itself an action. *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004). A judgment rendered by the district court that is merely a step or proceeding within the overall action is not a special proceeding. *Id.* A special proceeding which affects a substantial right is, by definition, not part of an action. *Id.* Generally, a “special proceeding,” within the meaning of § 25-1902, entails civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes. *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001). Examples of special proceedings include juvenile court proceedings, *Rebecca B. v. Sandra B. (In re Rebecca B.)*, 260 Neb. 922, 621 N.W.2d 289 (2000); probate actions, *In re Estate of Peters*, 259 Neb. 154, 609 N.W.2d 23 (2000); and workers’ compensation cases, *Thompson v. Kiewit Constr. Co.*, 258 Neb. 323, 603 N.W.2d 368 (1999). *Id.*

Actions brought under the State Tort Claims Act are not special proceedings within the meaning of § 25-1902. *Id.*

Pursuant to Neb. Rev. Stat. § 25-1902, neither the Nebraska Court of Appeals nor the Supreme Court had jurisdiction to address the inmate’s issues on appeal relating to order of adjudication of mentally ill and dangerous because the inmate did not appeal the district court’s finding that the order of adjudication was not a final order. When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *State v. Michael U. (In re Michael U.)*, 273 Neb. 198, 728 N.W.2d 116 (2007).

Appellate court lacked jurisdiction over an appeal from the trial court’s summary judgment for the State because there had been no adjudication of the State’s third-party claim against the highway construction company and the trial court had not made the express determination and the express direction as required under Neb. Rev. Stat. § 25-1315(1) to enter judgment on the injured motorist’s claim against the State. *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

Where the transcript of a district court proceeding did not contain an entry of judgment on a jury verdict prior to the filing, the filing and denial, of a motion for new trial were premature and null, so the Nebraska Supreme Court did not have appellate jurisdiction. *Macke v. Pierce*, 263 Neb. 868, 643 N.W.2d 673 (2002).

Where the judge failed to make a written notation of the relief granted or denied in compliance with the 1999 amendment to this section, the clerk was unable to enter a judgment and the appeal had to be dismissed. *Mumin v. Hart*, 9 Neb. App. 404, 612 N.W.2d 261 (2000).

Court orders are to be in writing, containing the relief granted or the order made. *State v. Wayne H.*, 8 Neb. App. 225, 590 N.W.2d 421 (1999).

File-stamped November 22, 2004, journal entry was a judgment because it resolved all issues raised in a city's declaratory action and the November 30 notice of appeal challenging that judgment constituted a timely appeal. Although the order of permanent injunction complicates the jurisdictional analysis, its entry on December 6 did not defeat the finality of the November 22 ruling from which the notice of appeal was explicitly taken. *City of Ashland v. Ashland Salvage, Inc.*, 271 Neb. 362, 711 N.W.2d 861 (2006).

Appeal of property award following divorce was ordered dismissed because the trial court's order failed to resolve the property distribution by failing to distribute the marital home. It was not a final order as the substantial rights of the parties concerning their property distribution remained undetermined. *Harvey v. Harvey*, 14 Neb. Ct. App. 380, 707 N.W.2d 444 (2005).

Judgment is a court's final consideration of the respective rights and obligations of the parties to an action as those rights exist at that time. *Metco, Inc. v. Huffman*, 2 Neb. Ct. App. 506, 511 N.W.2d 780 (1994).

Trial court's alleged orders purporting to reinstate cases after they had been dismissed were a nullity, because the alleged orders were neither signed by the trial judge nor filed and stamped by the clerk. *Murray Constr. Servs., Inc. v. Meco-Henne Contracting, Inc.*, 10 Neb. Ct. App. 316, 633 N.W.2d 915 (2001).

Appellate court erred by dismissing an appeal from a divorce case as untimely because a journal entry that stated the terms of a subsequent order did not determine the rights of the parties since it left certain issues unresolved; therefore, it was not a final judgment in the case. *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004).

The practice of a trial court's filing a journal entry which describes an order that is to be entered at a subsequent date is disapproved. The confusion presented by this case can be avoided if trial courts will, as they should, limit themselves to entering but one final determination of the rights of the parties in a case. The filing of both a journal entry and a subsequent order creates the potential for confusion. Instead, the trial court should notify the parties of its findings and intentions as to the matter before the court by an appropriate method of

communication without filing a journal entry. The trial court may thereby direct the prevailing party to prepare an order subject to approval as to form by the opposing party. Only the signed final order should be filed with the clerk of the court. *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004).

In absence of judgment or order finally disposing of case, Supreme Court has no authority or jurisdiction to act, and in absence of such judgment or order the appeal will be dismissed. *Larsen v. Ralston Bank*, 236 Neb. 880, 464 N.W.2d 329 (1991).

Order is final and appealable when substantial rights or parties to action are determined, even though cause is retained for determination of matters incidental thereto. *In re 1983-1984 County Tax Levy by Box Butte County Bd. of Equalization*, 220 Neb. 897, 374 N.W.2d 235 (1985).

Because no specific sums for child support were included in the trial court's order modifying an earlier paternity and custody decree, and because the rights and liabilities of the parties could not be ascertained without going beyond the record, the order was not a final, appealable order. Accordingly, the father's appeal of the trial court's order was dismissed for lack of jurisdiction. *Goeser v. Allen*, 14 Neb. Ct. App. 656, 714 N.W.2d 449 (2006).

Appointment of a receiver is an appealable final order. *Nebraska Nutrients, Inc. v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001); *Dickie v. Flamme Bros.*, 251 Neb. 910, 560 N.W.2d 762 (1997).

Denial of a motion to compel arbitration is a final, appealable order. *Webb v. American Employers Group*, 268 Neb. 473, 482, 684 N.W.2d 33 (2004).

APPEALABLE NON-FINAL (*i.e.*, interlocutory) ORDERS – Collateral Order Appeal Doctrine:

This court most recently explained the collateral order doctrine in *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006). In that case, we noted that this court had previously adopted the collateral order doctrine, *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997), an exception to the final order rule which was announced by the U.S. Supreme Court in *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949). We noted with approval the U.S. Supreme Court's pronouncement of the doctrine and held that for an order to fall within the doctrine, it must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment. *Hallie Mgmt. Co. v. Perry*, *supra*.

Appeal of an order granting a motion to disqualify counsel. [I]f the appeal from an order of disqualification involves issues collateral to the basic controversy and if an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, interlocutory review is appropriate. *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997). *But see, especially, Hallie Mgmt. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006).

ARBITRARY & CAPRICIOUS AND COMPETENT EVIDENCE DEFINED:

Arbitrary and capricious action is defined with reference to administrative agencies as action taken, in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion. The court does not substitute its judgment for that of the trial court regarding matters of evidence such as credibility of the witnesses or disputes and conflicts in testimony of the witnesses. Rather, the court reviews the evidence to determine if the evidence is sufficient to support the decision of the agency and the action taken. The tribunal conducting the hearing is more able to judge the credibility of the witnesses and evaluate the evidence submitted at the hearing. Thus, the court needs to determine if competent evidence supports the determination of the agency. Competent evidence has been defined as evidence that tends to establish the fact in issue. *Wagner v. City of Omaha*, 236 Neb. 843, 464 N.W.2d 175 (1991).

ASSIGNMENTS OF ERROR NOT DISCUSSED:

Errors must be assigned and argued in the party's brief to be considered by an appellate court. See, *In re Interest of A.C.*, 239 Neb. 734, 478 N.W.2d 1 (1991) (errors assigned but not argued will not be considered by appellate court); *In re Interest of B.M.*, 239 Neb. 292, 475 N.W.2d 909 (1991) (errors which are argued on appeal but not assigned will not be considered by appellate court). However, we have conducted a review for plain error of the district court's order affirming the Board's order of final disposition. Finding no plain error by the district court, we affirm. *Saville v. Burt County Mental Health Bd. (In re Saville)*, 10 Neb. Ct. App. 194, 626 N.W.2d 644 (2001).

To be considered by the Supreme Court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred. *Carlson v. Zellaha*, 240 Neb. 432, N.W.2d (1992); *State v. Melton*, 239 Neb. 576, 477 N.W.2d 154 (1991); *In re Interest of B.M.*, 239 Neb. 292, 475 N.W.2d 909 (1991); *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 472 N.W.2d 391 (1991).

The Supreme Court, in reviewing the decisions of the district court which affirmed, reversed, or modified decisions of the county court, will consider only those errors specifically assigned in the appeal to the district court and again

assigned as error in the appeal to the Supreme Court. *State v. Nowicki*, 239 Neb. 130, 474 N.W.2d 478 (1991).

[T]he defendant did not specifically assign any errors in his appeal to the district court. Therefore, absent plain error appearing on the record, there is nothing for this court to review on appeal. *State v. Keller*, 240 Neb. 566, 483 N.W.2d 126 (1992).

AND FURTHER,

Neb. Ct. R., Unif. Dist. Ct. R. 18: Statement of errors. Within 10 days of filing the bill of exceptions in an appeal to the district court, the appellant shall file with the district court a statement of errors which shall consist of a separate, concise statement of each error a party contends was made by the trial court. Each assignment of error shall be separately numbered and paragraphed. Consideration of the cause will be limited to errors assigned and discussed, provided that the district court may, at its option, notice plain error not assigned. This rule shall not apply to small claims appeals. (Last amended November 18, 1998).

Neb. Ct. R., Cty. Ct. R. 52(I)(G): Statement of errors. Within 10 days of the filing of the bill of exceptions in the district court, the appellant shall file with the district court a statement of errors, which shall consist of a separate, concise statement of each error a party contends was made by the trial court. Each assignment of error shall be separately numbered and paragraphed. Consideration of the case will be limited to errors assigned and discussed. The district court may, at its option, notice a plain error not assigned. This rule shall not apply to small claims appeals. (Last amended Oct. 27, 1993).

ATTORNEY FEES/GUARDIAN AD LITEM FEES:

A trial court's decision awarding or denying attorney fees will be upheld on appeal absent an abuse of discretion. In considering a trial court's order concerning the payment of guardian ad litem fees, the allowance, amount, and allocation of guardian ad litem fees is a matter within the initial discretion of a trial court, involves consideration of the equities and circumstances of each particular case, and will not be set aside on appeal in the absence of an abuse of discretion by the trial court. *John P. v. Paula P. (In re Karin P.)*, 271 Neb. 917, 716 N.W.2d 681 (2006).

BENCH TRIAL:

In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Kumar v. Douglas County*, 234 Neb. 511, 452 N.W.2d 21 (1990).

Among the factors entering into the trial court's resolution of any conflicts of evidence are such items as the respective interests of the parties in the litigation; the demeanor of witnesses, including the parties, while testifying before the court; the apparent fairness exhibited by witnesses; the extent to which the testimony of various witnesses is corroborated; and the reasonableness or unreasonableness of testimony from the witnesses. *Ohnstad v. Omaha Public School District*, 232 Neb. 788, 442 N.W.2d 859 (1989).

In reviewing a judgment awarded in a bench trial, the Supreme Court does not reweigh evidence but considers the judgment in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *City of LaVista v. Andersen*, 240 Neb. 3, 480 N.W.2d 185 (1992); *Nebraska Builders Prod. Co. v. Industrial Erectors*, 239 Neb. 744, 478 N.W.2d 257 (1992); *Metropolitan Util. Dist. of Omaha v. Pelton*, 236 Neb. 66, 459 N.W.2d 193 (1990).

In a bench trial of law action, trial court's factual findings have effect of jury verdict and will not be set aside on appeal unless they are clearly wrong. *City of LaVista v. Andersen*, 240 Neb. 3, 480 N.W.2d 185 (1992); *Nelson-Hoist v. Iverson*, 239 Neb. 911, 479 N.W.2d 759 (1992); *Nebraska Builders Prod. Co. v. Industrial Erectors*, 239 Neb. 744, 478 N.W.2d 257 (1992).

In a bench trial, it is presumed that the trial court considered only relevant and admissible evidence, and disregarded any irrelevant evidence. *State v. Dillon*, 222 Neb. 131, 382 N.W.2d 353 (1986); *Gibson v. City of Lincoln*, 221 Neb. 304, 376 N.W.2d 785 (1985).

A district court's findings of fact in a proceeding under the State Tort Claims act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1996), will not be set aside unless such findings are clearly erroneous. *Fickle v. State*, 273 Neb. 990, ___ N.W.2d ___, 2007 Neb. LEXIS 113 (July 20, 2007).

CONDITIONAL OR FUTURE ORDERS:

We have often and recently stated that a "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist. *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 602 N.W.2d 465 (1999). A conditional judgment is wholly void because it does not "perform in praesenti" and leaves to

speculation and conjecture what its final effect may be. *Id.* We have also stated that orders which specify that a trial court will exercise its jurisdiction based upon future action or inaction by a party are conditional and are therefore not appealable. *Deuth v. Ratigan*, 256 Neb. 419, 590 N.W.2d 366 (1999).

The confusion in this area of the law, if any exists, may stem from those cases in which this court has broadly stated that “conditional orders purporting to automatically dismiss an action upon a party’s failure to act within a set time are void as not performing in praesenti, and thus have no force or effect.” (Emphasis supplied.) *Schaad v. Simms*, 240 Neb. 758, 760, 484 N.W.2d 474, 475 (1992). A careful reading of the cases in which we have so stated reveals that such language stands for the proposition that conditional orders have no force and effect as a final order or a judgment from which an appeal can be taken. *See, e.g., State ex rel. Stenberg v. Moore, supra; Deuth v. Ratigan, supra; Schoneweis v. Dando*, 231 Neb. 180, 435 N.W.2d 666 (1989); *Federal Land Bank of Omaha v. Johnson*, 226 Neb. 877, 415 N.W.2d 478 (1987); *Lemburg v. Adams County*, 225 Neb. 289, 404 N.W.2d 429 (1987). The cases in which this proposition is generally relied upon are those in which an order was entered by the trial court purporting to dismiss a case upon the occurrence of some future event. Thus, a correct statement of the proposition is that conditional orders that do not perform in praesenti have no force and effect as a final order or judgment from which an appeal can be taken. *Custom Fabricators of Granite & Marble, Inc. v. Lenarduzzi*, 259 Neb. 453, 610 N.W.2d 391 (2000).

CONFLICT IN THE EVIDENCE:

Where the evidence is in conflict, we give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Miles v. Miles*, 231 Neb. 782, 438 N.W.2d 139 (1989).

CONSTITUTIONALITY:

In examining the validity of a legislative act, all reasonable doubts must be resolved in favor of its constitutionality. *Landon v. Pettijohn*, 231 Neb. 837, 438 N.W.2d 757 (1989).

A party claiming a statute is unconstitutional has the burden to show and clearly demonstrate that the questioned statute is unconstitutional. *Spilker v. City of Lincoln*, 238 Neb. 188, 469 N.W.2d 546 (1991).

In every constitutional challenge, there attaches the presumption that all acts of the legislature are constitutional, with all reasonable doubts resolved in favor of constitutionality. In reviewing a statute, a court does not pass judgment on the wisdom or the necessity of the legislation or whether the statute is based upon

assumptions which are scientifically substantiated. Even misguided laws may nevertheless be constitutional. Therefore, the court's inquiry under equal protection analysis is not whether it agrees with the wisdom or necessity of the law, but whether the law is rationally related to a legitimate governmental interest. *Le v. Lautrup*, 271 Neb. 931, 716 N.W.2d 713 (2006).

CONSTITUTIONAL QUESTION:

Neb. Ct. R. Prac. 9E (rev. 2001) requires that a party presenting a case involving the constitutionality of a statute must file and serve notice with the Supreme Court Clerk at the time of filing the party's brief. *State v. Johnson*, 269 Neb. 507, 695 N.W.2d 165 (2005). Rule 9E also provides that if the Attorney General is not already a party to the action, a copy of the brief assigning unconstitutionality must be served on the Attorney General within 5 days of the filing of the brief with the Supreme Court Clerk. A review of the record in this case reveals that Ptak failed to file a notice of a constitutional question and failed to serve upon the Attorney General, who is not a party to this action, a copy of his brief. *Ptak v. Swanson*, 271 Neb. 57, 709 N.W.2d 337 (2006).

This court has repeatedly held that strict compliance with rule 9E is required for the court to address a constitutional claim. *Id.*, citing: *State v. Feiling*, 255 Neb. 427, 585 N.W.2d 456 (1998) (refusing to consider constitutional question where record contained no separate written notice as required by rule 9E); *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994) (holding this court will not consider constitutional challenge where appellant failed to strictly comply with rule 9E). See, also, *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003); *Mid City Bank v. Douglas Cty. Bd. of Equal.*, 260 Neb. 282, 616 N.W.2d 341 (2000); *In re Application of SID No. 384*, 259 Neb. 351, 609 N.W.2d 679 (2000); *Zoucha v. Henn*, 258 Neb. 611, 604 N.W.2d 828 (2000); *In re Adoption of Kassandra B. & Nicholas B.*, 248 Neb. 912, 540 N.W.2d 554 (1995); *Proctor v. Minnesota Mut. Fire & Cas.*, 248 Neb. 289, 534 N.W.2d 326 (1995); *State v. Melcher*, 240 Neb. 592, 483 N.W.2d 540 (1992); *Holdrege Co-op Assn. v. Wilson*, 236 Neb. 541, 463 N.W.2d 312 (1990).

CONTEMPT:

We have . . . distinguished between contempt sanctions which are coercive in nature and those which are punitive in nature; that is to say, between those which aim to compel future obedience to the court's orders and decrees and are therefore coercive, and those which punish past disrespectful or contumacious conduct and vindicate the court's authority. In the coercive sanction, . . . the contemner holds the keys to his jail cell, in that the sentence is conditioned upon his continued noncompliance. The punitive sanction is much like the sentence in a criminal case, in that it is absolute and not subject to mitigation if the contemner

alters his future conduct toward the court, and takes on the aspects of a final order or of an order affecting a substantial right issued in a special proceeding, both of which are reviewable on appeal. . . . The coercive sanction, on the other hand, is always subject to modification by the contemner's conduct; that sanction is not final in any sense. Therefore, punitive sanctions are reviewable by appeal; whereas coercive sanctions can only be attacked collaterally by habeas corpus. *Smeal Fire Apparatus Co. v. Kreikemeier*, 271 Neb. 616, 715 N.W.2d 134 (2006).

CONTINUANCE:

A motion for continuance is addressed to the discretion of the trial court. *Keithley v. Black*, 239 Neb. 685, 477 N.W.2d 806 (1991).

BUT SEE: *Weiss v. Weiss*, 260 Neb. 1015, 620 N.W.2d 744 (2001)(The trial court abused its discretion in denying appellant's motion for a continuance, because appellant had requested no other continuances in the case, and there was no intent by appellant to unnecessarily delay the proceedings.

CROSS-EXAMINATION:

The trial judge first called Michael to testify and, at the conclusion of the questioning, refused to allow Denise's counsel to cross-examine Michael. The trial judge then called Denise to testify and refused to give Denise's counsel an opportunity to examine Denise after the trial judge's interrogation. The denial of Denise's counsel's requests certainly chilled any thoughts Michael might have had, as pro se, to cross-examine Denise. As such, Michael's rights to cross-examine Denise under § 27-614 were violated.

While we hold that under § 27-614(1) parties have the right to cross-examine witnesses called by a judge, we also note that a ruling regarding the extent, scope, and course of the cross-examination rests within the discretion of the trial court and will not be disturbed absent an abuse of that discretion. *Elstun v. Elstun*, 257 Neb. 820, 600 N.W.2d 835 (1999); *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987); *Nixon v. Harkins*, 220 Neb. 286, 369 N.W.2d 625 (1985).

DECLARATORY JUDGMENTS:

An action for declaratory judgment under the provisions of Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1995) is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. JLDI and MWRC's petition in this case seeks an injunction, whereas Central's

cross-petition seeks a declaration that the leases are void. An action for injunction sounds in equity. A suit on a contract is an action at law. Thus, while JLDI and MWRC's petition is an action in equity, Central's cross-petition is an action at law.

In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

In connection with questions of law and statutory interpretation, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Jeffrey Lake Dev., Inc. v. Cent. Neb. Pub. Power & Irrigation Dist.*, 262 Neb. 515, 633 N.W.2d 102 (2001); *In re Estate of Tvrz*, 260 Neb. 991, 620 N.W.2d 757 (2001); *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 611 N.W.2d 409 (2000).

In a declaratory judgment action treated as an action at law, we do not disturb factual determinations unless they are clearly wrong. *Glad Tidings Assembly of God v. Nebraska District Council of the Assemblies of God, Inc.*, 273 Neb. 960, ___ N.W.2d ___, 2007 Neb. LEXIS 110 (July 13, 2007); *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003).

A declaratory judgment action to construe a statute presents a question of law. *State Bd. of Ag. v. State Racing Comm.*, 239 Neb. 762, 478 N.W.2d 270 (1992).

DEMURRER (rest in peace - succeeded by R. 12(b)(6) motions to dismiss)

Neb. Rev. Stat. § 25-801.01(2)(c):

For all civil actions filed on or after January 1, 2003:

...

The cross-petition, cross-bill, and cross-suit are abolished. Demurrers to a pleading and special appearances shall not be used. The plea in bar, plea in abatement, and other dilatory pleas shall not be used in civil actions

A district court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. Pldg. Civ. Actions 12(b)(6) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. Dismissal under Rule 12(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of

the complaint that there is some insuperable bar to relief. *Johnson v. Johnson*, 272 Neb. 263, 720 N.W.2d 20 (2006).

DICTA:

A case is not authority for any point not necessary to be passed on to decide the case, or not specifically raised as an issue addressed by the court. *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989).

DIRECTED VERDICT:

In order to sustain a motion for directed verdict, the trial court must resolve the controversy as a matter of law and is to do so only when the facts are such that reasonable minds can draw only one conclusion; in considering the evidence for the purposes of a directed verdict motion, the party against whom the motion is made is entitled to have the benefit of every inference which can reasonably be drawn from the evidence, and the case may not be decided as a matter of law if there is any evidence in favor of the party against whom the motion is made. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994); *Baker v. St. Paul Fire & Marine Ins. Co.*, 240 Neb. 14, 480 N.W.2d 192 (1992).

The moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can reasonably be deduced therefrom. *Baker v. St. Paul Fire & Marine Ins. Co.*, 240 Neb. 14, 480 N.W.2d 192 (1992).

A defendant who moves for a directed verdict at the close of evidence in the plaintiff's case in chief and who, when the court overrules the directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for directed verdict. *Baker v. St. Paul Fire and Marine Ins. Co.*, 240 Neb. 14, 480 N.W.2d 192 (1992); *Sikvta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991).

A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law. *Gerhold Concrete Co. v. St. Paul Fire & Marine Ins.*, 269 Neb. 692, 695 N.W.2d 665 (2005).

Denial of a judgment authorized by Neb. Rev. Stat. § 25-1315.02 is an appealable order. *Ditloff v. Otto*, 239 Neb. 377, 476 N.W.2d 675 (1991).

DISMISSAL OR NONSUIT:

In a court's review of evidence on a motion to dismiss, the nonmoving party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can be reasonably drawn therefrom, and where the plaintiff's evidence meets the burden of proof required and the plaintiff has made a prima facie case, the motion to dismiss should be overruled. *Knaub v. Knaub*, 245 Neb. 172, 512 N.W.2d 124 (1994).

On appeal from an order of trial court dismissing an action at the close of plaintiff's evidence, the appellate court must determine whether the cause of action was proved and must accept the plaintiff's evidence as true, together with reasonable inferences drawn from that evidence; if there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law. *Bloomfield v. Nebraska State Bank*, 237 Neb. 89, 465 N.W.2d 144 (1991); *Russell v. Norton*, 229 Neb. 379, 427 N.W.2d 762 (1988).

DISSOLUTION OF MARRIAGE:

In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004).

EMPLOYMENT CONTRACTS:

A suit under an employment contract is an action at law, and this court will overturn factual findings of the trial court only if they are clearly wrong. *Unland v. City of Lincoln*, 247 Neb. 837, 530 N.W.2d 624 (1995); *Hammond v. City of Broken Bow*, 239 Neb. 437, 476 N.W.2d 822 (1991).

EQUITY STANDARD OF REVIEW:

We now address the trial court's decision to vacate its previous order of dismissal and reinstate this case outside the court term. We first note that the proper standard of review in this case is de novo on the record because the Hornigs sought reinstatement pursuant to the district court's independent equity jurisdiction. On appeal, equity actions are reviewed de novo on the record and questions of law and fact are determined independently from the trial court's conclusions. *Hornig v. Martel Lift Sys.*, 258 Neb. 764, 606 N.W.2d 764 (2000).

Apparently, there is some confusion as to the applicable standard of review because this court has previously stated, "an appellate court will reverse a decision on a motion to vacate or modify a judgment only if the litigant shows that the district court abused its discretion." *Thrift Mart v. State Farm Fire &*

Cas. Co., 251 Neb. 448, 451, 558 N.W.2d 531, 535 (1997). In *Thrift Mart*, however, the plaintiffs sought reinstatement of their dismissed case under both the trial court's statutory authority and under its independent equity jurisdiction. To the extent that *Thrift Mart* reviewed the trial court's refusal to exercise its independent equity powers for abuse of discretion, that decision is **overruled**. The correct standard of review for a trial court's exercise of equity jurisdiction is de novo on the record, with independent conclusions of law and fact. *Hornig v. Martel Lift Sys.*, 258 Neb. 764, 606 N.W.2d 764 (2000).

ERROR ON THE RECORD STANDARD OF REVIEW:

When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Stover v. County of Lancaster*, 271 Neb. 107, 710 N.W.2d 84 (2006).

ERROR PROCEEDINGS/PETITIONS IN ERROR Neb. Rev. Stat. §§ 25-1901 to 1908 (not to be confused with error proceedings in criminal cases nor with the abolished writ of error, on which, see below):

In an error proceeding to review an administrative agency decision, both the district court and the supreme court review the decision of the administrative agency to determine whether the agency acted within its jurisdiction and whether the decision of the agency is supported by sufficient relevant evidence. Evidence supports an administrative agency's decision reviewed in an error proceeding if the agency could reasonably find the facts for the agency's decision on the basis of the relevant evidence contained in the record before the agency. In an error proceeding to review an administrative agency's decision, the reviewing court is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact. *Wagner v. Omaha*, 236 Neb. 843, 464 N.W.2d 175 (1991).

A proceeding in error removes the record from an inferior tribunal to a superior tribunal in order for the superior tribunal to determine whether the judgment or final order of the inferior tribunal is in accordance with law. Thus, in an error proceeding, the district court and the supreme court review the administrative agency's decision with the same standard of review. *Id.*

A review by petition in error is conducted solely on record made by tribunal whose action is being reviewed, and no new facts or evidence can enter into consideration of court. *Niedbalski v. Board of Education of School District No. 24 of Platte Center*, 227 Neb. 516, 418 N.W.2d 565 (1988).

In proceeding in error, if tribunal acted within its jurisdiction and its findings are sustained by some competent evidence, its actions must be sustained. *Id.*

The petition in error statutes allow a judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions to be reversed, vacated, or modified by the district court. Further, a court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme. If a conflict exists between two statutes on the same subject matter, the special provisions of a statute prevail over the general provisions in the same or other statutes. Here, the Legislature considered the Board of Supervisors to be an administrative agency and the Board of Adjustment as a body that performs judicial or quasi-judicial functions. Thus, by adopting a specific method for appeal, the Legislature provided for an appeal specifically outside of the petition in error. Accordingly, we determine that an appeal from a board of supervisors denying a conditional use permit is to be taken in accordance with §§ 23-168.01 to 23-168.04 and not by a petition in error. *Mogensen v. Bd. of Supervisors*, 268 Neb. 26, 679 N.W.2d 413 (2004).

EXPERT WITNESSES:

Generally, a trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *John H. Orduna, Jr., v. Total Construction Services, Inc.*, 271 Neb. 557, 713 N.W.2d 471 (2006); *City of Lincoln v. Realty Trust Group*, 270 Neb. 587, 705 N.W.2d 432 (2005); *Lantis v. City of Omaha*, 237 Neb. 670, 467 N.W.2d 649 (1990).

Under rule 702, a witness can testify concerning scientific, technical, or other specialized knowledge only if the witness is qualified as an expert. Whether a witness is qualified as an expert is a preliminary question for the trial court. A trial court is allowed discretion in determining whether a witness is qualified to testify as an expert, and unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal. *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004).

Under rule 702, it is not enough that a witness is qualified as an expert. The trial court must also act as a gatekeeper to ensure the evidentiary relevance and reliability of the expert's opinion. *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). In *Schafersman*, we rejected the "general acceptance" test for determining the admissibility of an expert's testimony. In its place, we adopted the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), and *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004).

An appellate court reviews the record de novo to determine whether a trial court has abdicated its gatekeeping function. When a court is faced with a decision regarding the admissibility of expert opinion evidence, the trial judge must determine at the outset, in accordance with Neb. Evid. R. 702, whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. A trial court adequately demonstrates that it has performed its gatekeeping duty in determining the reliability of expert testimony when the record shows (1) the court's conclusion whether the expert's opinion is admissible and (2) the reasoning the court used to reach that conclusion, specifically noting the factors bearing on reliability that the court relied on in reaching its determination. A trial court may not abdicate its gatekeeping duty under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), in a bench trial, but the court is afforded more flexibility in performing this function. *Fickle v. State*, 273 Neb. 990, ____ N.W.2d ____, 2007 Neb. LEXIS 113 (July 20, 2007).

It is not enough for the trial court to determine that an expert's methodology is valid in the abstract. The trial court must also determine if the witness has applied the methodology in a reliable manner. *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004).

Whether a witness is qualified to testify as an expert under Neb. Evid. R. 702 is a preliminary question of admissibility for a trial court under Neb. Evid. R. 104(1). Such a determination will be upheld on appeal unless the trial court's finding is clearly erroneous. *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992).

We have previously pointed out that expert testimony is relevant and admissible only if it tends to help the trier of fact understand the evidence or to determine a fact issue and that expert testimony concerning the status of the law does not tend to accomplish either of these goals; as a consequence, expert testimony concerning a question of law is generally not admissible in evidence. *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W.2d 756 (1994); *Kaiser v. Western R/C Flyers*, 239 Neb. 624, 477 N.W.2d 557 (1991); *Sasich v. City of Omaha*, 216 Neb. 864, 347 N.W.2d 93 (1984); Neb. Evid. R. 401, 402, and 702, Neb. Rev. Stat. §§ 27-401, 27-402, and 27-702 (Reissue 1989). *See, also, State v. Thomas*, 236 Neb. 553, 462 N.W.2d 862 (1990) (expert testimony generally not admissible as proof counsel was ineffective). *Sports Courts v. Brower*, 248 Neb. 272, 534 N.W.2d 317 (1995).

[T]rials of fact, including the Workers' Compensation Court, are not required to take the opinions of expert witnesses as binding. *Aken v. Nebraska Methodist Hosp.*, 245 Neb. 161, 511 N.W.2d 762 (1994).

GROUND'S FOR TRIAL COURT'S DECISION:

When the record indicates that the decision of the trial court is correct, although for reasons different from those relied upon below, an appellate court will affirm the trial court's decision. *Troshynski v. Nebraska State Bd. of Pub. Accountancy*, 270 Neb. 347, 701 N.W.2d 379 (2005); *Ev. Lutheran Good Samaritan Soc. v. Buffalo County Bd. of Equalization*, 243 Neb. 351, 500 N.W.2d 520 (1993).

ISSUES NOT ADDRESSED ON APPEAL:

In disposing of an appeal, the supreme court considers only those errors which are properly assigned and presented to the court. Where a cause has been appealed to the supreme court from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to this court. In the absence of plain error, where an issue is raised for the first time in the supreme court, it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition. *Wagner v. City of Omaha*, 236 Neb. 843, 464 N.W.2d 175 (1991).

An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal. *Wagner v. City of Omaha*, 236 Neb. 843, 464 N.W.2d 175 (1991).

JUDGMENT NOTWITHSTANDING VERDICT:

In order to sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Critchfield v. McNamara*, 248 Neb. 39, 532 N.W.2d 287 (1995).

On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996).

A jury verdict will not be disturbed unless it is clearly wrong. *McCune v. Neitzel*, 235 Neb. 754, 457 N.W.2d 803 (1990).

JUDICIAL ABUSE OF DISCRETION:

A judicial abuse of discretion does not denote or imply improper motive, bad faith, or intentional wrong by a judge, but requires the reasons or rulings of a trial judge to be clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition through a judicial system. *John P. v. Paula P. (In re Karin P.)*, 271 Neb. 917, 716 N.W.2d 681 (2006). *Stewart v. Amigo's Restaurant*, 240 Neb. 53, 480 N.W.2d 211 (1992); *Wachtel Bv and Through Wachtel v. Beer*, 229 Neb. 392, 427 N.W.2d 56 (1988); see also *Brooke v. Brooke*, 234 Neb. 968, 453 N.W.2d 438 (1990).

JUDICIAL NOTICE:

[T]his court will take judicial notice of general rules and regulations established and published by Nebraska state agencies under authority of law. *City of Lincoln v. Central Platte NRD*, 263 Neb. 141, 638 N.W.2d 839 (2002); *Morrissey v. Department of Motor Vehicles*, 264 Neb. 456, 647 N.W.2d 644 (2002). Likewise, we will take judicial notice of rules and regulations established and published by federal agencies under authority of law. *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003).

JURISDICTION:

When determination of a jurisdictional question involves factual findings, a trial court's decision on the question of jurisdiction will be upheld unless the factual findings concerning jurisdiction are clearly incorrect. When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law, which requires an appellate court to reach a conclusion independent from the trial court's conclusion on the jurisdictional issue. *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989).

[W]hether a question is raised by the parties concerning the jurisdiction of a lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the matter before it. . . [W]hen lack of jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of a reviewing court to raise and determine the issue of jurisdiction sua sponte. When a trial court lacks the power, that is, jurisdiction, to adjudicate the merits of a claim, an appellate court also lacks power to adjudicate the merits of the claim. *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992).

JURY INSTRUCTIONS:

In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005); *Pugh v. Great Plains Ins. Co.*, 239 Neb. 171, 474 N.W.2d 677 (1991); *Sikvta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991).

An appellate court will not consider assignments of error pertaining to alleged errors in the instructions when the instructions are not included in the record. Neb. Ct. R. of Prac. 4A(2); *Stoco. Inc. v. Madison's Inc.*, 235 Neb. 305, 454 N.W.2d 692 (1990).

Where an examination of the instructions given by the trial court discloses plain error indicative of a probable miscarriage of justice, judgment will be reversed in favor of remanding case for new trial, even absent a proper objection by counsel. *Enyeart v. Swartz*, 218 Neb. 425, 355 N.W.2d 786 (1984).

JURY VERDICT:

As a general rule, in determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *John H. Orduna, Jr., v. Total Construction Services, Inc.*, 271 Neb. 557; 713 N.W.2d 471 (2006); *Vanek v. Prohaska*, 233 Neb. 848, 448 N.W.2d 573 (1989).

A verdict is not to be set aside where the evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact. *Chadron Energy Corp. v. First Nat'l Bank of Omaha*, 236 Neb. 173, 459 N.W.2d 718 (1990); *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989).

A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is any competent evidence presented to the jury upon which it could find for the successful party. *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989).

A jury verdict will not be disturbed on appeal unless it is clearly against weight and reasonableness of evidence and so disproportionate as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in record, or that jury disregarded evidence or rules of law. *Bay v. House*, 226 Neb. 521, 412 N.W.2d 466 (1987) .

A verdict based on conflicting evidence will not be set aside unless clearly wrong. *Janik v. Gatewood*, 233 Neb. 298, 444 N.W.2d 900 (1989).

A civil jury verdict will not be disturbed on appeal unless clearly wrong. The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved. *Streeks, Inc. v. Diamond Hill Farms, Inc.*, 258 Neb. 581, 605 N.W.2d 110 (2000).

An award of damages may be set aside as inadequate when, and not unless, it is so inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. If an award of damages shocks the conscience, it necessarily follows that the award was the result of passion, prejudice, mistake, or some other means not apparent in the record. *Poppe v. Siefker*, 274 Neb. 1, ___ N.W.2d ___, 2007 Neb. LEXIS 115 (July 27, 2007).

JUVENILE COURT:

On appeal of any final order of a juvenile court, an appellate court tries factual questions de novo on the record and is required to reach a conclusion independent of the findings of the trial court, but, when the evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another. An adjudication order in a juvenile court is an appealable order, and an appeal, if not made within 30 days after the order's entry, will be dismissed. That being true, the court ordinarily does not review the validity of an adjudication order in the absence of a direct appeal. However, this rule does not apply when the facts pleaded and the facts developed at the adjudication hearing are not sufficient for a juvenile court to acquire jurisdiction of a juvenile. If the pleadings and evidence at the adjudication hearing do not justify a juvenile court's acquiring jurisdiction of a child, then the juvenile court has no jurisdiction, that is, no power, to order a parent to comply with a rehabilitation plan, nor does the juvenile court have any power over the parent or child at the disposition hearing unless jurisdiction is alleged and proven by new facts at a new adjudication-disposition hearing. *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992).

LACK OF PROSECUTION:

Dismissal of a civil action for lack of prosecution is addressed to the discretion of a trial court, whose ruling, in the absence of an abuse of discretion, will be upheld on appeal. *Linch v. Northport Irrigation Dist.*, 14 Neb. Ct. App. 842, 717 N.W.2d 522 (2006).

Dismissal of a civil action for lack of prosecution is addressed to the discretion of a trial court, whose ruling, in the absence of an abuse of discretion, will be upheld on appeal. A dismissal for lack of prosecution is without prejudice and does not result in a disposition on the merits of a controversy. *Billups v. Jade, Inc.*, 240 Neb. 494, 482 N.W.2d 269 (1992) .

MISTRIAL:

A motion for mistrial is directed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent a showing of abuse of that discretion.

Genthon v. Kratville, 270 Neb. 74, 701 N.W.2d 334 (2005).

In *State v. Groves*, 239 Neb. 660, 673, 477 N.W.2d 789, 799 (1991), we stated: “The decision as to whether to grant a motion for mistrial is a matter within the discretion of the trial court, and such a ruling will be upheld absent an abuse of that discretion.” That holding was set out in a criminal case, but we hold it applies in a civil case as well. *Bloomquist v. ConAgra, Inc.*, 240 Neb. 135, 481 N.W.2d 156 (1992).

A mistrial is properly granted when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial. Egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of other incompetent matters are examples of occurrences which may constitute such events. . . . Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material. *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991).

MOOTNESS:

A case becomes moot when the issue initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory. A court decides real controversies and determines rights actually controverted, and does not address or dispose of abstract questions or issues that might arise in a hypothetical or fictitious situation or setting. An appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. This exception requires a consideration of the public or private nature of the question presented, the desirability of an

authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem. *In re Applications of Loren W. Koch*, 274 Neb. 96, ___ N.W.2d ___ (August 3, 2007).

As a general rule, appellate courts do not sit to give opinions on moot questions on abstract propositions, and an appeal will ordinarily be dismissed where no actual controversy exists between the parties at the time of the hearing. *Koenig v. Southeast Community College*, 231 Neb. 923, 438 N.W.2d 791 (1989).

Moot case is one which seeks to determine abstract question, which does not rest upon existing facts or rights. *Mullendore v. School Dist. No. 1 of Lancaster County*, 223 Neb. 28, 388 N.W.2d 93 (1986).

“Justiciable issue” requires present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement. *Koenig v. Southeast Community College*, 231 Neb. 923, 438 N.W.2d 791 (1989).

MUNICIPAL ORDINANCES:

Courts of general jurisdiction will not take judicial notice of municipal ordinances not present in the record, nor will appellate courts on appeal. *Hawkins Const. Co. v. Director*, 240 Neb. 1, 480 N.W.2d 183 (1992).

NEW TRIAL:

A motion for new trial is addressed to the discretion of the trial court, and the trial court’s decision will be upheld unless it is based upon reasons that are untenable or if its action is clearly against justice or conscience, reason, and evidence. *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005).

The standard of review of an order granting a new trial is whether the trial court abused its discretion. A motion for new trial should be granted only where there is error prejudicial to the rights of the unsuccessful party. Unless such error appears, a party who has sustained the burden and expense of trial, and who has succeeded in securing a verdict on the facts in issue, has a right to keep the benefit of that verdict. *Kumar v. Douglas County*, 234 Neb. 511, 452 N.W.2d 21 (1990).

A motion for new trial may appropriately be filed only in a trial court. It is improper to move for a new trial in a court which reviewed the decision of a lower court or administrative agency and thus functioned not as a trial court but

as an intermediate court of appeals. It necessarily follows then that the filing of a motion for new trial in a court which functioned as an intermediate court of appeals does not stop the running of the time within which to perfect an appeal from the reviewing court. *Booker v. Nebraska State Patrol*, 239 Neb. 687, 477 N.W.2d 583 (1991).

An untimely motion for new trial is ineffectual, does not toll the time for perfection of an appeal, and does not extend or suspend the time limit for filing a notice of appeal. *Metrejean v. Gunter*, 240 Neb. 166, 481 N.W.2d 176 (1992).

PLAIN ERROR:

When plain error permeates the entire proceedings, this court may elect to conduct a de novo review of the entire record under both its review and supervisory powers. *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992). “Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.” *In re Interest of D.W.*, 249 Neb. 133, 134, 542 N.W.2d 407, 408 (1996). “Plain error is ‘error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.’” *State v. Mercedes S. (In the Interest of Mainor T.)*, 267 Neb. 232, 674 N.W.2d 442 (2004).

Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion. *Katskee v. Nevada Bob’s Golf of Neb.*, 238 Neb. 654, 472 N.W.2d 372 (1991).

Plain error may be found on appeal, when an error, unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant’s substantial right and, if uncorrected, would cause a miscarriage of justice or damage the integrity, reputation, and fairness of the judicial process. *In re Estate of Fischer*, 227 Neb. 722, 419 N.W.2d 860 (1988).

POLITICAL SUBDIVISION TORT CLAIMS ACT:

A district court’s factual findings in a case brought under the Political Subdivisions Tort Claims Act will not be set aside unless such findings are clearly incorrect. *Kumar v. Douglas County*, 234 Neb. 511, 452 N.W.2d 21 (1990); *Ohnstad v. Omaha Public School District*, 232 Neb. 788, 442 N.W.2d 859 (1989).

PREJUDGMENT INTEREST:

Prejudgment interest may be awarded only as provided in Neb. Rev. Stat. § 45-103.02(2) (Reissue 2004), and whether prejudgment interest should be awarded is reviewed de novo on appeal. *The Travelers Indemnity Company v. International Nutrition, Inc.*, 273 Neb. 943, ___ N.W.2d ___, 2007 Neb. LEXIS 108 (July 13, 2007); *Ferer v. Aaron Ferer & Sons*, 272 Neb. 770, 725 N.W.2d 168 (2006).

PROBATE:

An appellate court reviews probate cases for error appearing on the record made in the county court. *Donley v. Donley (In re Donley)*, 262 Neb. 282, 631 N.W.2d 839 (2001).

When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Stover v. County of Lancaster*, 271 Neb. 107, 710 N.W.2d 84 (2006); *John P. v. Paula P. (In re Karin P.)*, 271 Neb. 917, 716 N.W.2d 681 (2006).

In appeal from county court's decision of probate matter as law action, the appellate court reviews the county court's decision and judgment for error appearing on the record in county court. *In re Estate of Goltl*, 233 Neb. 53, 443 N.W.2d 884 (1989).

An appeal from the allowance of a claim in probate is tried as an action at law. *In re Estate of Krueger*, 235 Neb. 518, 455 N.W.2d 809 (1990).

QUESTIONS OF LAW:

When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007).

RES JUDICATA:

The applicability of the doctrine of res judicata is a question of law. On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Ichtertz v. Orthopaedic Specialists of Neb., P.C.*, 273 Neb. 466, 730 N.W.2d 798 (2007); *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

An appellate court is not precluded from raising the issue of res judicata sua sponte, although it is infrequently done. *Dakota Title v. World-Wide Steel Systems, Inc.*, 238 Neb. 519, 471 N.W.2d 430 (1991).

RULE 12(b)(6) MOTIONS:

Compare former rule re demurrers: When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect. *Northwall v. State*, 263 Neb. 1, 637 N.W.2d 890 (2002).

An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim. . . . Because a rule 12(b)(6) motion tests the legal sufficiency of the complaint, not the claim's substantive merits, a court may typically look only at the face of the complaint to decide a motion to dismiss. . . . Dismissal under rule 12(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. . . . When analyzing a lower court's dismissal of a complaint for failure to state a claim, an appellate court accepts the complaint's factual allegations as true and construes them in the light most favorable to the plaintiff. *Ichtertz v. Orthopaedic Specialists of Neb., P.C.*, 273 Neb. 466, 730 N.W.2d 798 (2007); *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007).

Rule 12(b) provides that when matters outside the pleadings are presented by the parties and accepted by the trial court with respect to a motion to dismiss under rule 12(b)(6), the motion "shall be treated" as a motion for summary judgment as provided in Neb. Rev. Stat. §§ 25-1330 to 25-1336 (Reissue 1995 & Cum. Supp. 2006) and the parties shall be given reasonable opportunity to present all pertinent material. *Ichtertz v. Orthopaedic Specialists of Neb., P.C.*, 273 Neb. 466, 730 N.W.2d 798 (2007); *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007).

Under our current notice pleading rules, by receiving and considering matters outside the pleadings, the district court converted the motion to dismiss into a motion for summary judgment. Our rules concerning pleadings in civil actions are modeled after the Federal Rules of Civil Procedure, and we look to federal decisions for guidance. *See Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005). The principle recognized by federal courts is that when a court receives evidence which converts a motion to dismiss into a motion for summary judgment, it is important for the trial court to "give the parties notice of the changed status of the motion and a 'reasonable opportunity to present all material made pertinent to such a motion.'" *See Doe*, 273 Neb. at 83, 727 N.W.2d at 452-53, quoting 5C Charles Alan Wright & Arthur R. Miller,

Federal Practice and Procedure § 1366 (3d ed. 2004). *See, e.g., Country Club Estates, L.L.C. v. Town of Loma Linda*, 213 F.3d 1001 (8th Cir. 2000). *Ichtertz v. Orthopaedic Specialists of Neb., P.C.*, 273 Neb. 466, 730 N.W.2d 798 (2007)

Federal courts have also noted that when a motion to dismiss is converted to a motion for summary judgment, reversal of the “ruling may become necessary if the district court has not provided the adversely affected party with notice and an opportunity to respond.” *Alioto v. Marshall Field's & Co.*, 77 F.3d 934, 936 (7th Cir. 1996). “The primary vice of unexpected conversion to summary judgment is that it denies the surprised party sufficient opportunity to discover and bring forward factual matters which may become relevant only in the summary judgment, and not the dismissal, context.” *Portland Retail, etc. v. Kaiser Foundation, etc.*, 662 F.2d 641, 645 (9th Cir. 1981). *Ichtertz v. Orthopaedic Specialists of Neb., P.C.*, 273 Neb. 466, 730 N.W.2d 798 (2007).

STANDING:

Standing is a jurisdictional component of a party’s case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion. *County of Sarpy v. City of Gretna*, 267 Neb. 943, 678 N.W.2d 740 (2004).

STATUTE OF LIMITATIONS:

Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court. *Nuss ex rel. Nuss v. Alexander*, 269 Neb. 101, 691 N.W.2d 94 (2005).

The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong. *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999).

STATUTORY CONSTRUCTION:

The general rules governing statutory construction and interpretation provide that in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; this court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991).

Furthermore, it is not within the province of this court to read a meaning into a statute which is not warranted by the legislative language; neither is it within the province of this court to read anything plain, direct, and unambiguous out of the statute. In construing a statute it is presumed that the Legislature intended a sensible rather than an absurd result. *Matrisciano v. Board of Education*, 236 Neb. 133, 459 N.W.2d 230 (1990); *Houska v. City of Wahoo*, 235 Neb. 635, 456 N.W.2d 750 (1990); *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990).

STATUTORY INTERPRETATION:

Statutory interpretation is a matter of law in connection with which this court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Sorensen v. City of Omaha*, 230 Neb. 286, 430 N.W.2d 696 (1988).

When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning so that, in the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning. *State Bd. of Aq. v. State Racing Comm.*, 239 Neb. 762, 478 N.W.2d 270 (1992).

STIPULATED FACTS:

In a case in which the facts are stipulated, an appellate court reviews the case as if trying it originally in order to determine whether the facts warranted the judgment. *Jindra v. Clayton*, 247 Neb. 597, 529 N.W.2d 523 (1995); *Douglas Cty. Bank & Trust v. Stamper*, 244 Neb. 226, 505 N.W.2d 693 (1993); *Dobias v. Service Life Ins. Co.*, 238 Neb. 87, 469 N.W.2d 143 (1991).

SUMMARY JUDGMENT:

[T]he denial of a summary judgment motion is neither appealable nor reviewable. *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 208, 655 N.W.2d 855, 862 (2003)

A denial of a motion for summary judgment is not a final order and therefore is not appealable. *Keystone Ranch Co. v. Central Nebraska Public Power and Irr. Dist.*, 237 Neb. 188, 465 N.W.2d 472 (1991); *Kimco Additions Inc. v. Lower Platte South Natural Resources District*, 232 Neb. 289, 440 N.W.2d 456 (1989).

In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992).

Whether partial summary judgment is final and appealable order depends upon its effect. *Larsen v. Ralston Bank*, 236 Neb. 880, 464 N.W.2d 329 (1991).

Where all of plaintiff's theories are based on same operative facts and involve same parties, summary judgment with regard to only some theories does not constitute final, appealable order which Supreme Court may consider. *Lewis v. Craig*, 236 Neb. 602, 463 N.W.2d 318 (1990).

THEORY OF APPEAL:

As a general rule, an appellate court disposes of a case on the theory presented in the district court. Likewise, an issue not presented to or decided by the trial court is not appropriate for consideration on appeal. *Kubik v. Kubik*, 268 Neb. 337, 683 N.W.2d 330 (2004).

WEIGHT OF THE EVIDENCE:

In our judicial system, it is entirely within the province of the jury to weigh the evidence and resolve the resulting conflicts. *Chadron Energy v. First National Bank Corp. of Omaha*, 236 Neb. 173, 459 N.W.2d 718 (1990).

WRITS OF ERROR ABOLISHED: Neb. Rev. Stat. § 25-1930.

ZONING:

On appeal, a district court may disturb the decision of a zoning appeals board only when the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong. In reviewing a decision of the district court regarding a zoning appeal, the standard of review is whether the district court abused its discretion or made an error of law. *Lamar Co. of Neb., L.L.C. v. Omaha Zoning Bd. of Appeals*, 271 Neb. 473, 713 N.W.2d 406 (2006).

A district court may disturb the decision of a board of adjustment if the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong. In deciding whether a board's decision is supported by the evidence, the district court shall consider any additional evidence it receives. In appeals involving a decision of a board of adjustment, an appellate court reviews the decision of the district court, and irrespective of whether the district court took additional evidence, the appellate court is to decide if, in reviewing a decision of a board of adjustment, the district court abused its discretion or made an error of law. Where competent evidence supports the district court's factual findings, the appellate court will not substitute its factual findings for those of the district court. *Hanchera v. Bd. of Adjustment*, 269 Neb. 623, 694 N.W.2d 641 (2005).

An appeal from a board of supervisors or board of commissioners denying a conditional use permit must be taken in accordance with Neb. Rev. Stat. §§ 23-168.01 to 23-168.04 (Reissue 1997) and not by a petition in error. *Gabel v. Polk County*, 269 Neb. 714, 695 N.W.2d 433 (2005).

Courts will generally presume that legislative or rulemaking bodies, in enacting ordinances or rules, acted within their authority and that the burden rests on those who challenge their validity. The validity of a zoning ordinance must be determined by an examination of the facts presented in the particular case. This court gives great deference to a city's determination of which laws should be enacted for the welfare of the people. When the city rezones a parcel of property, we presume the validity of that action absent clear and satisfactory evidence to the contrary. When the city considers a request for rezoning based upon a plan or representation by the developer, it is presumed that the city grants the request after making the determination that the plan as represented is in the interest of public health, safety, morals, and the general welfare. *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005).

Where the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control. *Giger v. City of Omaha*, 232 Neb. 676, 442 N.W.2d 182 (1989).